

On February 1, 2005 appellant, then a 37-year-old rural carrier, filed a traumatic injury claim alleging that on January 28, 2005 he hurt his neck, arms and left hand and experienced frequent headaches as a result of a motor vehicle accident which occurred in the performance of duty.

By decision dated March 18, 2005, the Office denied appellant's claim. It found that the record was sufficient to establish that the alleged incident occurred at the time, place and in the manner alleged; however, the medical evidence was sufficient to establish that appellant sustained a medical condition causally related to the automobile accident. On April 6, 2005 appellant requested a review of the written record by an Office hearing representative. In a March 7, 2005 medical report, Dr. Joseph N. Gabriel, a Board-certified internist, stated that appellant experienced diffuse myofascial pain, trouble with his left hand and frequent headaches due to the February 1, 2005 employment incident. Appellant also experienced pain in the lumbar region. Treatment notes covering intermittent dates from June 9 to July 24, 2005 indicated that appellant received physical therapy for his left shoulder and low back pain.

By decision dated August 23, 2005, an Office hearing representative affirmed the March 18, 2005 decision. She found that the evidence submitted by appellant was insufficient to establish that he sustained a medical condition causally related to the accepted January 28, 2005 employment incident.

In a September 25, 2005 report, Dr. Gabriel's stated that appellant had low back pain.

By letter dated October 17, 2007, appellant requested reconsideration of the August 23, 2005 decision. He submitted medical reports of Dr. John M. Motto, a specialist in palliative medicine, dated from October 10, 2006 to October 2, 2007. Dr. Motto stated that appellant had other syndromes affecting the cervical region which included cervical syndrome, Klippel's disease and occipital neuralgia. Appellant also had facet arthropathy syndrome, myalgia and myositis not otherwise specified and photophobia. In an August 13, 2007 report, Dr. Motto stated that appellant's prognosis remained fair but the physician could not address questions regarding appellant's fitness for work or disability as they were outside the scope of his practice. He recommended a functional capacity evaluation followed by an independent medical evaluation by a rehabilitation medical specialist.

In a decision dated November 15, 2007, the Office found that appellant's October 17, 2007 letter requesting reconsideration was more than one year after the August 23, 2005 decision and untimely. It found that the evidence he submitted failed to establish clear evidence of error in the Office's prior decisions.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 20 C.F.R. § 10.607(a).

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹¹

ANALYSIS

The Board finds that appellant failed to file a timely application for review of the August 23, 2005 merit decision. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹²

The most recent merit decision was issued by an Office hearing representative on August 23, 2005. She found that appellant did not sustain a medical condition causally related to the accepted January 28, 2005 employment incident. As appellant's October 17, 2007 letter

⁴ *Id.* at § 10.607(b).

⁵ *Nancy Marciano*, 50 ECAB 110, 114 (1998).

⁶ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁷ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

⁸ *Leona N. Travis*, *supra* note 6.

⁹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ *Velletta C. Coleman*, 48 ECAB 367, 370 (1997).

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹² *Larry L. Litton*, 44 ECAB 243 (1992).

requesting reconsideration was made more than one year after the August 23, 2005 decision, it was not timely filed.

The Board further finds that appellant has not submitted evidence establishing clear evidence of error by the Office in finding that he did not sustain an injury causally related to the January 28, 2005 employment incident. In support of his October 17, 2007 reconsideration request, appellant submitted Dr. Gabriel's September 25, 2005 report which noted that appellant experienced low back pain. Dr. Motto's reports stated that appellant had other syndromes affecting the cervical region which included cervical syndrome, Klippel's disease and occipital neuralgia. Appellant also had facet arthropathy syndrome, myalgia and myositis not otherwise specified and photophobia. In an August 13, 2007 report, Dr. Motto stated that he could not address questions regarding appellant's fitness for work and disability as they were outside the scope of his practice. He recommended a functional capacity evaluation followed by an independent medical evaluation by Dr. Westerkam. This evidence is insufficient to *prima facie* shift the weight of the medical evidence in favor of appellant's claim. Neither Dr. Gabriel nor Dr. Motto provided any opinion as to whether appellant sustained a medical condition causally related to the January 28, 2005 employment incident. The Board finds that their reports do not establish clear evidence of error. For this reason, the Board finds that appellant has not established clear evidence of error on the part of the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board